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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 580

S. B. LAWRENCE ET AL., APPELLANTS,

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED DECEMBER 19, 1931

(36,394)

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[fols. a & 1] [Caption omitted]

[fol. 2]

IN CHANCERY COURT OF HINDS COUNTY

No. 18865

S. B. LAWRENCE

vs.

STATE TAX COMMISSION et al.

PETITION—Filed Jan. 10, 1931

To the Honorable Chancery Court, First Judicial District, Hinds County, Mississippi:

Comes S. B. Lawrence, adult citizen and actual resident of the City of Jackson, in the First Judicial District of Hinds County, Mississippi, and complaining herein of Lester C. Franklin, Chairman of the State Tax Commission, Webb Walley and H. H. Casteel, members of the State Tax Commission, and A. S. Coody, its Clerk, in pursuance of Section 5057, Mississippi Annotated Code 1930, respectfully prays an appeal and requests a review of the proceedings had and done in that certain cause lately pending before the State Tax Commission, styled, In the Matter of S. B. Lawrence, Income Tax, determined adversely to petitioner on the 20th day of December, 1930, and with reference thereto, complainant respectfully shows unto the Court the following statement of facts:

That for the year 1929 he had no taxable income earned within the borders of the State of Mississippi.

That in the year 1929, he earned profits in the amount of $50,949.36 wholly within the State of Tennessee, and that such profits were earned in the fulfillment of certain contracts entered into for the construction of roads with political subdivisions of the State of Tennessee, wholly within the State of Tennessee, no part of which was done or performed in the State of Mississippi.

That for the year 1929, his net income, before deducting income taxes, but after deducting donations, was $49,905.67, which included the aforementioned earnings and profits earned in the State of Tennessee from contracts performed in Tennessee.

[fol. 3] That for the year 1927, he paid state income tax in the amount of $1,977.95, during the year 1928.

That for the year 1927, he paid federal income tax in the amount of $4,965.11, no part of which was deducted from income in determining the income on which state income tax of $1,977.95 was assessed.

That for the year 1929, his federal income tax amounted to $4,830.14, no part of which was deducted in determining the net income of $49,905.67, all of which, as aforesaid, was wholly earned and collected without the State of Mississippi, and in the State of Tennessee, by virtue of the performance of certain contracts entered into in the said State of Tennessee, with political subdivisions of the said State of Tennessee.

Prior to the 29th day of October, 1930, the Tax Commission of the State of Mississippi gave to the said S. B. Lawrence, Complainant, notice of an additional assessment for the year 1929, amounting to $2,288.31.

That complainant being aggrieved at the action of the Commission, under date of October 29th, 1930 appealed from said additional assessment.

That upon November 11th, 1930, complainant filed with the Mississippi State Tax Commission a written statement setting out the position of Complainant in respect thereto.

"November 11th, 1930.

IT-101/7831.
HNE: E/838.
S. B. Lawrence, Jackson, Miss.

Assessment of income tax for the Calendar year 1929, in the amount of $2,288.31, together with interest at 6%, or $102.97.

State Tax Commission, Jackson, Mississippi.

GENTLEMEN: In the matter of the above assessment of [fol. 4] Income Tax, application for hearing of appeal has been duly made to the Commissioner, in accordance with Section 35 of the Income Tax Law of 1924, as amended.

Under interpretation of Section 11, Chapter 132, Laws of 1924 (Income Tax Law) as amended by House Bill No. 283; Special Session, 1928, the Commissioner has held that profits in the amount of $50,949.36 earned by this tax-payer, wholly within the State of Mississippi should be included his taxable income, computing a proposed tax of $2,288.31.

The following facts are necessary for a consideration of the contentions of tax payers hereinafter set forth:

(1) Tax-payer had profits for the year 1929 of $50,949.36 earned wholly without the State of Mississippi; namely profits on contracts for the construction of roads in the State of Tennessee with bond there approved under supervision of State authority, and by and through a plant established in said State of Tennessee.

(2) Tax-payer is a citizen of Mississippi.

(3) For the year 1927 tax-payer paid Federal Income Tax to the amount of $4,965.11, which tax was not deducted in determining net income for purposes of State Income Tax for the year 1927.

(4) That for the year 1929 Tax-Payer paid Federal Income Tax in the amount of $4,830.14, which amount has not been deducted in determining the alleged net income of $4,905.67, on which alleged income of $49,905.67 the proposed tax of $2,288.31 is assessed.

(5) That for the year 1927 tax payer paid income tax to the State of Mississippi in the amount of $1,977.95, predicated on a net income of $50,259.03.

(6) That regulations No. 1 and No. 2 promulgated by the Commissioner denied tax-payer the benefit of the deduction of Federal Income tax paid in determining net income [fol. 5] subject to income tax to State of Mississippi. Such regulations being the interpretation of Section 12 of Chapter 132, Laws of 1924.

(7) That tax-payer has filed claim for credit for excess income tax paid the State of Mississippi for the year 1927 in the amount of $248.25. The claim for refund asserted tax-payer's right to deduct Federal Income Tax before determining income subject to tax by the State of Missis-

sippi. The claim for refund was rejected by the Commissioner.

(8) That under Section 41 of the Income Tax Law of 1924 when there no remaining appropriation available for refund of income tax over paid, yet a tax-payer has, within the period of limitation sustained the right to such overpayment, a certificate of over-assessment will be issued to tax-payer, to be used in paying future income tax or to be held until such time as funds are made available by appropriation for refund.

Tax-payer now submits that there is no tax due for the year 1929; but that there is due to be issued a certificate of over-assessment in the amount of $248.25 for taxes improperly assessed for the year 1927.

Tax payer submits that as to earnings outside the State of Mississippi an enforcement of the tax imposed by Section 4, of the Income Tax Law of 1924 would render same unconstitutional, as violative of the 14th Amendment to the Constitution of the United States in that such construction of the statute would deprive him of his property without due process of law and deny to him equal protection of the law, because (1) the earning or income was exclusively earned outside the State, (2) such earning is not subject to taxation upon the part of a foreign corporation doing business within the state, (3) that a non-resident of the [fol. 6] State of Mississippi, doing business in the State under similar circumstances is not subject to tax under the conditions obtaining herein, (4) that under House Bill No. 283, Special Session 1928, amending Section 11 of Chapter 132, Laws of 1924, (Income Tax Law) such an earning is not subject to taxation upon the part of a domestic corporation under similar circumstances. Section 112 of the Constitution of Mississippi provides taxation must be equal throughout the State, and Section 181 provides that corporations shall be taxed as individuals.

Tax-payer contends that Section 12 of Chapter 132, Laws of 1924, (Income Tax Law) does not prohibit the deduction of Income Taxes paid to the United States of its possession; but submits that if it should be held that such section did intend so to disallow the deduction of such income taxes then such disallowance is confiscatory to principle

in that the State of Mississippi has no regulatory power over the rate and amount of income tax that might be imposed by the United States and its possessions. This is particularly true as to the income here taxed. Following the rule proposed to be applied, there is nothing to prevent the State of Tennessee from imposing an income tax equal to or exceeding 50 per centum of the income earned within its borders, and to disallow the deduction of any income tax paid to the State of Mississippi on such earnings in determining the income to be taxed; and for the State of Mississippi to impose a tax equal to 50% of net income determined without the benefit of deducting the income tax paid to the State of Tennessee. If the foregoing condition should obtain, and the taxes so indicated were imposed by the States, then as to the year of 1929, on the agreed net income of taxpayer, the following would result:

"Net income subject to tax by the State of Tennessee	$50,949.36
Net income subject to tax by the State of Mississippi	49,905.67
Income Tax imposed by Tennessee	$25,474.68

[fol. 7]

Income Tax imposed by Mississippi	24,952.83
Total Tax	$50,427.51

The actual net income of tax payer for the year 1929 was $49,905.67 before deduction of Federal Income tax paid. Taxpayer, under the conditions outlined would have paid no Federal Income Tax, but would have paid income tax to the two states in a total amount that would have exceeded the net income by $521.84. It matters not that the State of Tennessee at present imposes no tax on income, and that the tax imposed by the State of Mississippi does not approximate the rate employed above, nor is it pertinent that the present tax on income is at graduated rates, such a method being optional with the tax imposing powers, and the rates, though graduated could be increased to produce a tax equal to or greater than 50 per centum.

Chapter 132 of Laws of 1924 is an act levying an income tax. The predicate for the tax must necessarily be income. Can income be determined without the benefit of the deduction of income tax? Could there be excluded from the deductions to be employed in determining income the items of expense that are necessary to the receiving of the income so taxed, such as rent, labor, ad valorem taxes, privilege taxes, etc.? Income Taxes imposed by the United States are as mandatory as the taxes imposed by political subdivisions of the State of Mississippi.

Section 29 of Chapter 132, Laws of 1924, provides a limitation period of three years from the date of filing of a return in which assessment of additional taxes can be made. Section 35 of the statute limits the time in which tax-payers can apply for a revision of taxes assessed to one year from the date of filing of return or of assessment. It would appear then that income tax return of taxpayer for the year 1927 is subject to review by the Commissioner and assessment of any additional tax that might be determined to be due, whereas tax-payer has not the right to apply for a revision of the tax assessed for the year 1927. If such is the construction, then it is unconstitutional in that it is [fol. 8] violative of the 14th Amendment to the Constitution of the United States.

Tax-payer now submits that if it be held that income earned without the State of Mississippi is subject to tax under Chapter 132, Laws of 1924, then the income of $49,905.67 be first reduced by the amount of $4,830.14, Federal Income Tax for the year 1929, and that the tax be calculated on the true net income of $45,075.53, and that from the resulting tax of $2,022,65 there be deducted the amount of $248.25 (together with interest thereon at 6% from March 15, 1928) being taxes improperly paid for the year 1927.

Respectfully submitted.

(Signed) S. B. Lawrence."

That the deductions of the complainant were correctly set out in the foregoing document; that proof thereof was filed with the said Tax Commission by said Complainant, all of which was copied in and became part of the record in this cause.

That a certified copy of the record showing all of the proceedings had and done in respect thereto is hereby at-

tached and marked Exhibit "A" as if set forth in words and figures.

That upon the 20th day of December 1930 the Mississippi State Tax Commission wrote a letter to the Complainant in words and figures as follows, to-wit:

"Lester C. Franklin, Commissioner. DeQuency V. Sutton, Deputy Commissioner

Division of Income Tax, Mississippi State Tax Commission, Jackson, Mississippi

Office of the Commissioner, Returns Section

In Replying Refer to It-101/7831, HNE:E/838. (Enclosure.)

Dec. 20, 1930.

[fol. 9] S. B. Lawrence, Esq., c/o Watkins, Watkins & Eager, Attorneys, Jackson, Mississippi.

DEAR SIR: This office wishes to advise you that your appeal from the assessment of additional State Income Tax made against you by this office for the calendar year 1929 in the sum of $2,391.28, having been heard by the State Tax Commission, has been denied.

A certified copy of the Minutes in relation thereto is enclosed.

Respectfully, (Signed) Lester C. Franklin, Commissioner."

That the original of said letter is hereto attached, the same being asked to be considered as if set forth herein in full in words and figures.

Complainant avers that no tax whatever was then and there due and it was unlawful on the part of the Mississippi State Tax Commission to make said additional assessment against Complainant, and it was unlawful on the part of the Mississippi State Tax Commission to deny complainant's petition for a review, but that on the other hand said assessment should have been reviewed as prayed for by Complainant. That said petition for appeal and review before the entire Commission was filed by the Complainant within one year from the date of the notice given to Complainant of the assessment of any additional tax.

Complainant shows unto the court that Section 11, Chapter 132, Mississippi Laws 1924 as amended by Chapter 32, Mississippi Laws 1928 Extraordinary Session, violates the Fourteenth Amendment of the Constitution of the United States in that the same deprives the complainant of his property without due process of law and denies to him the equal protection of the law.

[fol. 10] For all of the reasons hereinbefore set out, which reasons and objections are now re-alleged and averred, complainant alleges and avers the fact to be: That Chapter 32 Mississippi legislature of 1928, extraordinary session, as construed and enforced, violates the fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of his property without due process of law, and denies to him the equal protection of the law; for that, in the imposition of liability for income tax for the year 1929, said act arbitrarily discriminated against this petitioner. The petitioner during the year 1929, was engaged in the business of constructing public roads, streets and highways in the state of Mississippi, Louisiana and Tennessee. That during said years, and during all subsequent years, he was in active competition with domestic corporations organized under the laws of the State of Mississippi, and domiciled therein, which corporations were likewise engaged in the business of building roads, highways and streets in the states of Louisiana, Mississippi and Tennessee, and that there was, during said years prior thereto, and at all times since, a large number of domestic corporations in the state of Mississippi, engaged in carrying on business and transacting business in said three states aforementioned, as well as other states where said domestic corporations had places of manufacture, production and/or places of merchandise.

That under Chapter 32, as aforesaid, this petitioner became and was adjudicated to be liable for taxes on income thus earned and collected out of the state of Mississippi where he maintains a business situs, while all of said domestic corporations aforesaid, engaged in a similar line of business with the petitioner and/or engaged in other lines of commercial and industrial pursuits were not liable to pay a tax on income earned beyond the limits of the State of Mississippi, because no liability was imposed

thereupon under said act; and that such corporations have [fol. 11] not paid said tax to the State of Mississippi: but, upon the other hand, have been, by the Mississippi State Tax Commission, adjudged to be free from liability therefor, and no demand made therefor, but income earned from without the State has been intentionally, continuously and systematically deducted from the gross income of domestic corporations.

Petitioner further shows that there are, having a situs in the State of Mississippi, a large number of foreign corporations, incorporated under the laws of other states in the Union, whose principal place of business is in the State of Mississippi, which corporations are engaged in similar lines of business to that of petitioner, as well as other lines of commerce and industry; that said corporations likewise have places of manufacture production and of merchandise in the State of Louisiana, Arkansas, Tennessee, Alabama and other states than that of their domicile, earn income therein, and no liability is imposed upon them for income thus earned beyond the limits of the State of Mississippi. That thereby an unjust, arbitrary and unwarranted discrimination was created, adjudicated and enforced against this petitioner, by reason of which, said act hereinbefore referred to, violates the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore set out.

That the Legislature of the State of Mississippi is without power and authority to impose and/or collect tax on gains, profits or income derived and earned beyond the limits of the State and that Section 32, Mississippi Legislature, extraordinary Session 1928, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of property without due process of law and denies to him the equal protection of the law thereby.

The petitioner further shows: (1) That in the year 1927, petitioner should have been permitted to deduct from income the sum of $4,965.11, paid to the Federal Government, [fol. 12] and (2) that in the year 1929, petitioner was assessed with income earned and collected wholly without the State of Mississippi, and was not permitted to deduct from

such income the sum of $4,830.14 paid to Federal Government for income tax.

Petitioner shows unto the court that this petition is filed within thirty days from receipt from the Mississippi State Tax Commission of its findings against this petitioner and denying to him the relief prayed for, shown by the record in this case.

Wherefore Petitioner prays that this petition requesting a refund and review of the proceedings of the State Tax Commission may be filed and that such refund and review may be had. That Petitioner files herewith a bond with good and sufficient surety to be approved by the Clerk of this Court in a sum double the amount in controversy conditioned to pay the judgment of the Court.

Complainant prays that the clerk of this Court shall issue notice to the Tax Commission of the filing of said petition and bond, as provided in Section 5057, Mississippi 1930 Code, as aforesaid, and that the State Tax Commission cause the records or the proceedings in that office to be transmitted to this court, and that said court will take jurisdiction to review said proceedings and to render a decree as in equity and good conscience may seem proper. Whereunder and whereby there may be awarded to petitioner a correct and just judgment.

That a judgment may be rendered by this court vacating and setting aside the assessment made against complainant petitioner as prayed for by the petitioner before the Mississippi State Tax Commission.

And if petitioner has not prayed for proper relief the Court will grant such other and general relief as may be just and expedient in the premises.

Watkins, Watkins & Eager, Attorneys for the Petitioner.

[fol. 13] *Duly sworn to by S. B. Lawrence. Jurat omitted in printing.*

[File endorsement omitted.]

EXHIBIT "A" TO PETITION

"Copy." "Copy"

STATE OF MISSISSIPPI,
County of Hinds:

Now comes S. B. Lawrence, a citizen of the State of Misssissippi, and residing in the City of Jackson, who first being duly sworn, deposeth and saith:

That for the year 1929 he had no taxable income earned within the borders of the State of Mississippi.

That in the year 1929 he earned profits in the amount of $50,949.36 wholly within the State of Tennessee; and that such profits were earned in the fulfillment of certain contracts entered into for the construction of roads with political subdivisions of the State of Tennessee, wholly within the State of Tennessee, no part of which was done or performed in the State of Mississippi.

[fol. 14] That for the year 1929 his net income before deducting Income Taxes but after deducting donations was $49,905.67, which included the aforementioned earnings and profits earned in the State of Tennessee from contracts performed in Tennessee.

That for the year 1927 he paid State Income Tax in the amount of $1,977.95, during the year, 1928.

That for the year 1927 he paid Federal Income Tax in the amount of $4,965.11, no part of which was deducted from income in determining the income on which State Income Tax of $1,977.95 was assessed.

That for the year 1929 his Federal Income Tax amounted to $4,830.14, no part of which was deducted in determining the net income of $49,905.67, all of which, as aforesaid was wholly earned and collected without the State of Mississippi and in the State of Tennessee, by virtue of the performance of certain contracts entered into in the said State of Tennessee with political subdivisions of the said State of Tennessee.

All of the foregoing is hereby made a part of the appeal to the Tax Commission.

(Signed) S. B. Lawrence.

Sworn to and subscribed before me this 14th day of November, 1930. (Signed) M. J. Conerly, Notary Public. (Seal.)

[fol. 15] "Copy"

Lester C. Franklin, Commissioner. de Quincy V. Sutton, Deputy Commissioner

Division of Income Tax, Mississippi State Tax Commission, Jackson, Mississippi

Office of the Commissioner, Returns Section

In replying Refer to IT: 101-7831, HNE: E/838. (Enclosure.)

Dec. 20, 1930.

"Copy"

S. B. Lawrence, Esq., % Watkins, Watkins & Eager, Attorneys, Jackson, Mississippi.

DEAR SIR: This office wishes to advise you that your appeal from the assessment of additional State Income Taxes made against you by this office for the calendar year 1929 in the sum of $2,391.28, having been heard by the State Tax Commission, has been denied. A certified copy of the minutes in relation thereto is enclosed.

Respectfully, (Signed) Lester C. Franklin, Commissioner. E.

[fol. 16] "Copy"

BEFORE THE STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, AT THE STATE CAPITOL

In the Matter of the Petition of S. B. LAWRENCE for Revision of Income Tax Assessed

This matter coming on for hearing on this the fourteenth day of November, 1930, at the State Capitol, pursuant to requisite notice, and it appearing that S. B. Lawrence, an individual, residing in Jackson, Hinds County, Mississippi, and doing business as the Lawrence Construction Company, has heretofore been assessed with additional tax for the year 1929, in the sum of $2,288.31 and interest thereon, said assessment having been made by the Chairman of the State Tax Commission, and Commissioner, under the provisions of Chapter 132, Laws of 1924; and it appearing that the

said S. B. Lawrence has heretofore made written application to the Commissioner, as provided by said Chapter, for revision of the said Income Tax so assessed, and that the said petition has been denied by the Commissioner, said application has been made, by the petitioner, for hearing before this Commission, as required by law.

It having been agreed by the taxpayer, S. B. Lawrence, and the Commissioner, that the matter be presented by written brief, and the Commission having before it the brief filed for and on behalf of the said taxpayer, and the returns and statements submitted by the said taxpayer and his accountants; and it appearing that the matter in controversy is the exclusion from the income tax return of the said taxpayer for the year 1929 of certain sums of money earned from contracts alleged to be in interstate commerce, and the deduction by the taxpayer of federal income taxes paid, and the Commission, after carefully reading the brief of the said taxpayer and being fully advised in the premises that all the matters of fact in the said matter, the Commission is of the opinion that the decision of the Commissioner should be approved.

[fol. 17] It is, therefore, ordered and adjudged that the decision of the Commissioner heretofore may be and the same is hereby in all things approved and confirmed, and the petition of the taxpayer herein be denied, and that the same be and is hereby dismissed.

Ordered and adjudged this the fourteenth day of November, 1930.

"Copy-

STATE OF MISSISSIPPI,
County of Hinds:

I, A. S. Coody, Secretary of the State Tax Commission, of the State of Mississippi, do hereby certify that the foregoing is a true, correct and complete copy of an order of the State Tax Commission adopted on the date therein stated as the same appears at page 60, of Minute Book Number 4, as officially recorded in the office of the State Tax Commission.

Witness my official seal and signature this the 20th day of November, 1930.

(Signed) A. S. Coody, Secretary State Tax Commission. (Seal.)

[fol. 18] IN CHANCERY COURT OF HINDS COUNTY

[Title omitted]

DEMURRER—Filed Feb. 13, 1931

Now comes Mississippi, State Tax Commission, Lester C. Franklin, Chairman of Mississippi State Tax Commission, Webb Walley and H. H. Casteel, members of said State Tax Commission, and A. S. Coody, Secretary of said State Tax Commission, respondents in the above entitled and numbered cause, and demurs to the petition for review exhibited against them by S. B. Lawrence, petitioner, for the following causes of demurrer, to-wit:

1. There is no equity on the face of said petition.

2. The petition affirmatively shows that the petitioner is legally and equitably required to pay the amount of income taxes to the State of Missisippi assessed against him as shown by the allegations of said petition and the exhibits thereto.

3. The petition affirmatively shows on its face that the income tax laws of the State of Mississippi, in so far as this petitioner is concerned, are legal, valid and binding upon him and are not violative of or repugnant to any of the provisions or the spirit of the Constitution of the State of Mississippi or the Constitution of the United States of America.

4. The petition shows on its face that the state has levied, and can legally levy, an income tax on a resident citizen's [fol. 19] income derived entirely outside of the State.

5. The petition shows on its face that this petitioner may not complain that an exemption is granted to foreign and domestic corporations from paying income taxes to the State of Mississippi on income derived wholly outside of said State.

6. The petition shows on its face that the petitioner here may not complain that the state has allowed three years to itself in which to re-calculate any income taxes he may owe and that said petitioner has only one year for application for refund of any erroneously paid income tax.

7. The petition shows on its face that the State of Mississippi is not required to allow any deduction from taxable income of the amount accrued or paid during the taxable year for Federal Income Taxes levied under the authority of the United States Government.

And for other causes to be made known upon this hearing.

Geo. T. Mitchell, Attorney General of Mississippi,
by Forrest B. Jackson, Solicitors for Respondents.

I, Forrest B. Jackson, Assistant Attorney General, one of solicitors for respondents, hereby certify that I believe the foregoing demurrer ought to be sustained.

Forrest B. Jackson.

[File endorsement omitted.]

[fol. 20] In Chancery Court of Hinds County, First Judicial District, January Term, 1931

No. 18865

S. B. Lawrence, Petitioner,

v.

State Tax Commission et al., Respondents

Final Decree—Filed Feb. 23, 1931

This cause comong in this day for hearing on petition of S. B. Lawrence, in pursuance of the provisions of Section 50 57, Mississippi Annotated Code, 1930, for a review of the final action of the Mississippi State Tax Commission assessing and making final an assessment of income taxes in the sum of $2,288.31, with 6% interest thereon from October 29, 1930, until paid, and demurrer of defendants, State Tax Commission, Lester C. Franklin, Chairman, and Webb Walley and H. H. Casteel, members, and A. S. Coody, Secretary, and the Court having heard the presentation of the petition and the demurrer, argument and suggestions for counsel for all parties, who were then present in person and by counsel, and the court being fully advised in the

premises, and having considered the same, if of the opinion that the demurrer should be and the same is hereby sustained.

It is therefore ordered, adjudged and decreed that the demurrer to the petition be and the same is hereby sustained, and counsel for petitioner having announced in open court that petitioner declined to plead further, the petition is hereby dismissed and the petitioner denied any of the relief therein sought.

It is further ordered, adjudged and decreed that the State of Mississippi hereby recovers of and from S. B. Lawrence, Petitioner, and sureties on his bond, the sum of $2,288.31, income taxes for the year 1929, *for the year 1929*, together with interest at 6% per annum thereon from October 29th, [fols. 21 & 22] 1930, until paid, together with all costs herein expended, for which let execution issue.

It is further ordered, adjudged and decreed that the said S. B. Lawrence, petitioner, is hereby granted an appeal, with supersedeas, to the Supreme Court of Mississippi, as by law provided in such cases, upon his entering into a good and sufficient appeal bond in the sum of Five Thousand ($5,000.00) Dollars to be approved by the Chancery Clerk.

Ordered, adjudged and decreed, this the 23rd day of February, 1931.

V. J. Stricker, Chancellor.

O. K. as to form. W. H. Watkins.

[File endorsement omitted.]

Bond on appeal for $5,000, approved February 23, 1931, omitted in printing.

[fol. 23] Bond on appeal for $6,000, approved and filed January 10, 1931, omitted in printing.

[fol. 24] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE ET AL.

v.

STATE TAX COMMISSION ET AL.

ASSIGNMENTS OF ERROR—Filed April 13, 1931

Comes S. B. Lawrence and Fidelity & Deposit Company of Maryland, appellants, by attorneys, and complain of error comcitted in a certain decree rendered by V. J. Stricker, chancellor, on the 23rd day of February, 1931, adversely to them, and assign the following error:

1. The court below committed error in sustaining a demurrer and dismissing appellants' petition for review filed in said cause.

2. The court below committed error in rendering a judgment against appellants therein for the taxes involved.

3. The court below committed error in not granting the relief prayed for in the petition for review filed on behalf of the said S. B. Lawrence.

4. The court below committed error in holding that income arising out of contract executed beyond the limits of the state of Mississippi, and wholly and totally performed beyond the limits of the State of Mississippi, was subject to income tax under the laws of the State of Mississippi.

5. The court below committed error in holding that section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, did not violate the 14th amendment to the Constitution of the United States, in that the same deprived the said S. B. [fol. 25] Lawrence of his property without due process of law and denied to him the equal protection of the law.

6. The court below committed error in holding that section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, was valid against the objections of the appellants that the

same violated the 14th amendment to the Constitution of the United States in that said section of said laws, as construed and enforced by the court below deprived these appellants of their property without due process of law, and denied to them the equal protection of the law.

7. The court below committed error in enforcing against these appellants section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, for that said chapter, as construed and enforced in this case, violated the 14th amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law, and denied to them the equal protection of the law..

8. Chapter 32, Mississippi laws, 1928, extraordinary session, as construed and enforced in this case against the appellants, violated section 112 and section 181 of the Constitution of the State of Mississippi.

9. The court below committed error in failing and refusing to permit the said S. B. Lawrence to deduct from income earned the sum of $4,965.11 paid to the United States government federal income tax; such action upon the part [fol. 26] of the court violated the Constitution of the United States and the acts of Congress, in that the enforcement of such tax imposed liability upon instrumentalities of the United States Government.

10. The court below committed error in failing and refusing to overrule the appellee's demurrer to the petition for review filed by the said S. B. Lawrence.

11. The construction of chapter 32, Mississippi laws 1928, extraordinary session, and the enforcement thereof against the appellants, under the facts shown in this record, caused said chapter 32, and each and every section and paragraph thereof, to violate the 14th amendment to the Constitution of the United States, in that the enforcement of such chapter against the appellants in this case deprived them, and each of them, of their property without due process of law, and denied to them the equal protection of the law and also caused said chapter, and each and every section and paragraph thereof, to violate section 112 and section 181 of the Constitution of the State of Mississippi,

which requires uniformity of taxation, and also requires corporations and individuals to be taxed in the same manner, by reason of which the court below committed error.

12. Other causes to be assigned at the hearing.

Stevens & Heidelberg, Watkins, Watkins & Eager,
Attorneys for the Appellants.

I, William H. Watkins, of counsel for the appellants in the above entitled cause, certify that I have this day mailed to the Hon. George T. Mitchell, Attorney General of the [fol. 27] State of Mississippi, a true and correct copy of the foregoing assignment of error by United States mail, postage prepaid, at Jackson, Mississippi.

Dated April 11, 1931.

W. H. Watkins.

[File endorsement omitted.]

[fol. 28] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE

vs.

STATE TAX COMMISSION

JUDGMENT—Nov. 9, 1931

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Hinds County, and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein, it is therefore ordered, adjudged and decreed that the Decree rendered therein on the 23rd day of February, 1931, be, and the same is hereby affirmed. It is therefore ordered, adjudged and decreed that The State of Mississippi, do have and recover of and from the appellant, S. B. Lawrence, and the Maryland Casualty Company, surety on the appeal bond herein, the sum of $2,288.31 with interest thereon at the rate of 6% per annum from October

29th, 1930, to February 23rd, 1931 amounting to $57.20 making a total of $2345.51, the amount of the decree in the court below, together with interest thereon at the rate of 6% per annum from February 23rd, 1931, until paid, and also the further sum of $117.27, being 5 per centum damages as allowed by statute, and all costs of court below and of this appeal to be taxed etc.

[fol. 29] IN SUPREME COURT OF MISSISSIPPI. EN BANC

29464

S. B. LAWRENCE et al.

vs.

MISSISSIPPI STATE TAX COMMISSION

OPINION

ETHRIDGE, J.:

S. B. Lawrence, the appellant, is a resident of Hinds County, Mississippi, engaged in constructing and maintaining public roads and highways in the State of Mississippi and in other states. In the year 1929 he went into the state of Tennessee, entered into and completed contracts for the construction of certain highways, which contracts were entered into and entirely completed in the state of Tennessee. He collected from that state the money accruing to him by reason of the performance of said contracts. His net income was such that, if his income, earned and collected entirely beyond the limits of the State of Mississippi, in the State of Tennessee, were subjects to taxation he would be owing the State of Mississippi the sum of $2,288.31.

The Mississippi State Tax Commission, in accordance with the provisions of the Mississippi statutes on the subject, took steps to assess him with the income tax imposed by law. The appellant appeared before the State Tax Commission and objected to the assessment of the said income tax, contending that he is not subject to the income tax upon money earned outside of the state of Mississippi in the contract above referred to; that the state could not, under the

14th section of the bill of rights of the State of Mississippi, or the 14th amendment to the constitution of the United States, impose liability for income earned as result of performing labor or pursuing an occupation beyond the limits of the state, and in the limits of another state.

[fol. 30] On the hearing the Tax Commission assessed him with an income tax, on the income earned out of the state. The appellant thereupon filed a bill in chancery in accordance with Section 5057, Code of 1930, to review the assessment. He contended that Chapter 32 Extraordinary Session Mississippi Legislature 1928 did not impose liability for income earned wholly out of the state of Mississippi; that if the statute should be so construed and enforced as to impose liability upon him for such income then the statute would violate the above sections of the constitution. It was alleged that Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws of 1928 Extraordinary Session, violates the above sections of the constitution because it does not apply to incomes earned by domestic corporations wholly outside of the State of Mississippi. We quote from complainant as follows:

"Complainant alleges and avers the fact to be: "That Chapter 32, Mississippi legislature of 1928, Extraordinary Session, as construed and enforced, violates the fourteenth amendment to the constitution of the United States in that the same deprives the petitioner of his property without due process of law, and denies to him the equal protection of the law; for that, in the imposition of liability for income tax for the year 1929, said act arbitrarily discriminated against this petitioner. The petitioner during the year 1929, was engaged in the business of constructing public roads, streets and highways in the state of Mississippi, Louisiana and Tennessee. That during said years, and during all subsequent years, he was in active competition with domestic corporations organized under the laws of the State of Mississippi, and domiciled therein, which corporations were likewise engaged in the business of building roads, highways and streets in the states of Louisiana, Mississippi and Tennessee, and that there was during said years, prior thereto, and at all times since, a large number of domestic corporations in the State of Mis-
[fol. 31] sissippi, engaged in carrying on business and

transacting business in said three states aforementioned, as well as other states where said domestic corporations had places of manufacture, production and/or places of merchandise."

He further alleges that other such domestic corporations were not assessed with or held to be liable to an income tax earned beyond the limits of the state of Mississippi by such domestic corporations, and that such corporations have not paid such taxes to the state of Mississippi but have been adjudged by the Mississippi State Tax Commission to be free from liability therefor, and that no demand had been made therefor, but that such income earned from without the State has been intentionally, continuously and systematically deducted from the gross income of domestic corporations.

It will be seen from an examination of Chapter 32, Laws of State of Mississippi, Extraordinary Session of 1928, amending section 11 of Chapter 132, Laws of 1924, that for the purpose of this act, except as otherwise provided for nonresidents, the term gross income does not include income of a domestic corporation when earned from sources outside this state, and such sources shall be defined to mean all manufacture or production and places of merchandising.

The chancery court held the appellant liable for the tax and rendered judgment against him, from which this appeal is prosecuted.

If the Chapter 32 of Laws of State of Mississippi, Extraordinary Session 1928, is constitutional, of course the appellant is subject to the tax; if such act is unconstitutional then Section 11 of Chapter 132, Laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. State v. G. M. & N. R. R. Co. 13[illegible] Miss., 70, 104 So., 689, and authorities therein cited. It is therefore unnecessary to decide whether Chapter 32, Laws [fol. 32] of Mississippi, Extraordinary Session 1928, is constitutional or not, because from either viewpoint the same conclusion and judgment would be reached—that is to say—in taking either view the appellant would be liable

for the tax. See Miller, Tax Collector, vs. C. & G. Ry. Co., 154 Miss., 317, 122 So., 366, at page 324 of the Mississippi Report where the court said:

"In event a railroad discriminated against by this statute should challenge the validity thereof on the ground that it is arbitrarily discriminated against, it would not be necessary for the court to decide the question, for so to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complainant railroad's tax would be three hundred fifty dollars per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

See also Moore v. Tunica County, 143 Miss., 821, 107 So., 659; Claiborne County v. Moorehead, 145 Miss. 867, 111 So., 372; Buford v. State, 146 Miss., 66, 111 So. 850; Miller v. Tucker, 142 Miss., 146; 105 So. 774; Pearl River County v. Lacy Lumber Company, 124 Miss. 85, 86 So. 755; Adams v. Standard Oil Co. of Ky., 97 Miss., 879, 53 So. 692; American Express Co. v. Beer, 107 Miss., 528, 65 So. 575, L. R. A. 1918 E. 446, Ann. Cas. 1916 D 127.

The judgment of the court below must therefore be affirmed.

Affirmed.

[Vol. 33] IN SUPREME COURT OF MISSISSIPPI. IN BANC

29464

S. B. LAWRENCE et al.

vs.

STATE TAX COMMISSIONER

DISSENTING OPINION

GRIFFITH, J., Dissenting:

The primary point involved in this case may be briefly stated: The income tax laws of the State impose upon a resident natural person a tax upon his income whether

earned within or without the State, and at the same time excludes from the income tax of a domestic corporation all income produced beyond the borders of the State; and the question is whether thereby a discriminatory tax is levied against a resident natural person in respect to his said outside income.

The formula, which has been respected over and over, by which to determine the validity vel non of making a tax-taking difference between those subject thereto and of a classification for that difference, is that the difference or classification "must be reasonable, not arbitrary"; and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989; Lowry v. Clarksdale, 154 Miss., 155, 170. That a greater burden cannot be laid on an individual than upon a domestic corporation, similarly situated in respect to the burden so imposed, would seem obvious, and it has been expressly so held in Frost v. Corporation Commission, 278 U. S. 515, 74 L. Ed., 483, as well as other cases, state and federal.

As said in Crescent Mfg. Co., v. Tax Commission, 129 S. C. 480, 485; "The income tax is primarily a subjective tax imposing personal liability upon the recipient of the [fol. 34] income. It proceeds fundamentally upon the theory that all residents and citizens of the State, whether natural persons or domestic corporation-, should contribute to the public treasury in proportion to ability to pay, measured by the amount of income from all sources". But our law, disregarding that fundamental theory, enacts that although the domestic corporation has an equal ability to pay out of its income derived from without the state as compared to a resident natural person deriving exactly the same income and in exactly the same business from without the state, the domestic corporation is relieved of the tax on that outside income, while resident natural person must pay on identically that same thing. It had as well be said that an individual shall pay while a partnership shall be exempt, or that those who occupy, and conduct their operations in, wooden buildings shall pay while those who conduct their business in brick or stone buildings shall be exempt.

But it seems to me to be unnecessary to pursue the discussion of a proposition which reveals its discriminatory character upon its very face and as plainly so as any argument or review at length would disclose. The majority opinion does not undertake to intimate or hold to the contrary. It simply declines to decide the question and asserts as a justification therefor that even if the discrimination in fact exists this would not aid appellant, the resident natural person, for the reason that the discriminatory exemption, so called, in favor of the domestic corporation would be void and might be stricken from the law, thereby leaving that portion of the laws, which taxes the individual to stand; and to sustain its position the majority cites a number of cases decided by this court, not one of which upon its facts goes, as I submit, to the deeper question which is here before the court.

[fol. 35] The larger number of the cases cited by the majority will be found to be cases dealing with amendments which within themselves are void and this without regard to the original law which is sought to be amended. These cases, of course, have no pertinent application here as will be later herein mentioned. The two or three other cases cited by the majority will be found to fall upon an analysis of their facts, within two well recognized rules which nobody disputes; first, it is a well recognized rule that if the objectionable parts of a statute are separable, no matter of legislative intent, from the remainder thereof, the objectionable part may be stricken out and the statute will be enforced in those parts that are constitutional. There are many cases where the same statute, or statutes amendatory, although dealing with the same general subject, deal also with substantially separate divisions or items under that general subject, these separate divisions or items having no constitutional or other essential connection one with another, in which cases the objectionable items may be eliminated and the remainder enforced. And, second, where the objectionable portion is of such inferior or minor importance in relation to the dominent purpose and scope of the statute, that it can be safely assumed that the legislature would have passed the statute omitting the objectionable portion, then the court can accomplish that pur-

pose by striking out the objectionable minor or inferior portion. This is pointed out in Adams v. Standard Oil Co., 97 Miss., 879, 907. Those principles are summerized in Cooley's Const. Lim. (8th Ed.) P. 364 as follows: "When a part of a statute is unconstitutional, that fact does not compel the court to declare the remainder void, unless the unconstitutional part is of such import that the other parts of the statute, if sustained without it, would cause results not contemplated or desired by the legislature. The question to be determined is whether the obnoxious part is an inducement to the whole act or whether it is a mere incident thereto."

[fol. 36] But here we have, not two substantially separate divisions of items under the same general subject, but what is substantially one item or division, namely, the item of the income tax earned beyond the limits of the state, and the point is that this one item or division is made to bear differently on two different taxpayers, who in respect to the object of the legislation are similarly situated. Because this item is made thus to bear differently on those similarly situated, it cannot for that reason be said that this makes different items of them, for if this were true every case of discrimination could be evaded of relief by a similar mode of construction and the constitutional guaranty of equal protection would be, as to tax matters, reduced to a mere scrap of paper. And even if the conception could be entertained that because the item is made to bear differently upon different taxpayers, although similarly situated, there thus arises in a sense two separate items, this does not aid the question here, because as to that question the two have here, in a constitutional sense, an inseparable connection each with the other, for the fact is that it is the inescapable attrition of one upon the other that produces or gives rise to the very constitutional question we have here in hand.

Nor can it be said that the provision with reference to domestic corporation- is a mere incidental, or minor or inferior feature of the enactment as compared with the provision imposing the tax on a resident natural person. On the contrary there is the more reason to believe—in view of the fact that to impose the tax on domestic corporation- on outside incomes would drive many if not most of the larger of the domestic corporations to go to other states, to

the great loss of the treasury of the state—that the legislature, when this matter was brought to their attention in 1928, would probably have enacted the amendment of 1928 excluding the outside incomes of domestic corporations and at the same time would have excluded also the outside incomes of residental natural persons if at the time the inad- [fol. 37] missibility of any discrimination in this matter had been known to the legislature. Whether, if they had so known, they would have enacted that all incomes produced outside of the state would be excluded, or, on the other hand, they would have included such outside incomes both as to resident natural persons and domestic corporations, the court has no means of determining, and unless the court can so determine, there is no legitimate power in the court to strike out that which is the last deliberate expression of the legislative will on the subject. Com. v. Hanna, 195 Mass. 262, 122 Am. St. 251, 11 Ann. Cas. 514, 11 L. R. A. (N. S.) 799, and see the text and the numerous cases noted in 6 R. C. L. pp. 121-130.

The true role is tersely stated in Howard v. Illinois Cent. R. Co., 207 U. S. 463, 52 L. ed. 297, 310, as follows: "Even in a case where legal provisions may be severed from those which are illegal in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provision eliminated." Or as was said, in Pollock v. Farmer's L. & T. Co., 158 U. S. 601, 39 L. ed. 1108, 1125, wherein it was urged that an unconstitutional exception in a statute should be disregarded:

"The insuperable difficulty with the application of that principle to the present instance is that * * * it would confer upon the statute a positive operation beyond the legislative intent and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

And no occasion has more strikingly illustrated the principle for which I am contending than the notable case involving the grandfather amendment to the Oklahoma constitution prescribing a literacy test for electors but further provising that persons who on January 1st, 1866 were entitled to vote and the lineal descendants of those persons should not be subject to the test. The court in holding that

the proviso was discriminatory and rested upon no sustain-
[fol. 38] able differentisting reason was urged to disregard the proviso by striking it out, and thereby allow the literacy test to stand without the proviso, but the court refused to take that course for the reason that it could not be said whether, if the proviso were eliminated, the literacy test as thus exercised would have been enacted, and therefore the court struck down the literacy test itself. So exactly in this case,—instead of an intimation that the particular provision excluding the outside incomes of domestic corporations might be stricken down the entire item of the law in respect to incomes earned outside the state should be stricken—so far as those outside incomes are concerned, whether earned by individuals or corporations. See also Connelly v. Union Co., 184 U. S. 540, 46 L. ed. 679, 692.

This latter brings the more distinctly into view this further inescapable inquiry: If the provisions mentioned are severable so as to become two provisions, which is it of the two conflicting provisions in this case that is the objectionable portion? Admittedly the legislature had the power to enact that the income of a domestic corporation produced outside of the state should not be taxable in this state, so that clearly that enactment is not unconstitutional within itself. Now then is that enactment to be said to be objectionable so as to be stricken down? It is said that it is objectionable and may be stricken because by its existence there is caused a discrimination against a resident natural person, who by the requirement of the income tax law is taxed as to his income produced outside of the state. But it is not this latter portion, which imposes the discriminatory tax, that is the objectionable portion? This latter is the active agent that is seeking to impose the discriminatory tax and is therefore the offending portion, not the portion which does not seek to impose the tax and is thus wholly inactive and inoffensive.

[fol. 39] And, as against the views which I am endeavoring to maintain, nothing is gained by the argument that because the original income tax law of 1924 taxed the outside incomes of both of resident natural persons and of domestic corporations, and because it is the amendment of 1928 to that law which excludes the outside incomes of domestic corporations, and which has produced the dis-

crimination herein complained of, thereby importing into the statute an unconstitutional question, therefore the amendment is the particular element that must be stricken and this without regard to the validity of the amendment within itself and without regard to the importings of the amendment as related or as compared to that with which it comes into conflict. Certainly, it is the rule that a valid statute cannot be amended by an unconstitutional amendment, when the amendment within itself is unconstitutional, as was the case, for instance in Buford v. State, 146 Miss. 66, Moore v. Tunica County, 143 Miss. 829, and in most of the others cited by the majority. In such cases the amendment falls of its own weight, not because of its constitutional relation with other provisions of the statute amended. But I repeat that the amendment here is entirely constitutional within itself, and when its confiict with the provision taxing outside incomes of resident natural persons comes into review on the question which of the two must go down, then it is a further question of legislative intention, and this reduces it to the further question as to the relative or comparative importance of the one provision against the other, and unless the provision brought in by the amendment is of such inferior importance, as compared with the particular remaining provision with which it comes into conflict, that the court can see and can say that the legislature, if it had at the time known of the inadmissibility of the conflict on constitutional grounds, would not have enacted the amendment, then the court has [fol. 40] no authority to strike the amendment down, nor adjudicate the case in hand upon any hypothesis that it may simply be disregarded.

When an amendment is made to a statute, it is as much a part thereof as if originally written therein, and the entire statute is brought forward as if re-enacted in its entirety on the date of the passage of the amendment. Suppose the amendment here enacted that no incomes produced outside of the state by those engaged in agriculture, in horticulture, in manufacturing, in mercantile pursuits whether wholesale or retail, in lumbering, in road-building and in transportation, should be included in their income tax returns, thereby excluding ninety per cent of those in the state who earn any income outside of the state, would the court say that because of the discrimination against the

ten per cent who do not come within the excluded classes, the whole amendment must be stricken, and all incomes derived beyond the state should be taxable, in clear contravention of the preponderant legislative intent as expressed on the subject at the time of its reconsideration when the amendment was enacted. This question answers itself. The court has no legitimate legislative powers, and cannot convert itself into a legislative body and produce as statutory law by judicial decision that which the legislature would not or probably would not at the time have allowed: and thus is demonstrated that it is not the mere technical fact that the matter is contained in an amendment valid in itself, but the controlling issue is as to the relative importance of the matter made a part of the statute by the amendment, and as to what the legislature would have done at the time if the inadmissibility of the discrimination had been in mind. Certainly, in this respect and in every respect, germane to the question here before us, amendments stand upon equal if not upon higher ground than do exceptions or provisos, as to which latter, direct and controlling authorities upon the exact point have already been cited. See also Lewis' Sutherland Statutory Construction, (2nd Ed) Secs. 305, 306.

[fol. 41] But I will not further elaborate upon the discussion; I desire, having outlined the grounds which are regarded by me controlling here, only to add the following observations touching the attitude in which the court is left by the result reached by the judgment of the majority opinion, which as I submit, has been merely to scratch the surface—has been to float down the stream of least resistance, and has been not to face the question before us.

Now in what attitude exactly does the majority opinion place this court in respect to a mandatory provision of the supreme law of the land that "no state shall enforce any law which shall deny to any person within its jurisdiction the equal protection of laws?" That the laws of this state in the respect mentioned do deny to appellant the equal protection of the law is clear, and as already stated the majority opinion does not undertake to assert to the contrary. But here is the court's exact attitude: If the state tax collector or the attorney general were to sue domestic corporations for their outside income taxes on the ground that the income tax law as amended makes an unconstitu-

tional discrimination in favor of domestic corporations, and that for that reason the exclusion of the outside income of domestic corporations is void, the court would answer him as was recently held by the Supreme Court of the United States in Columbus & G. Ry. Co. v. Miller, 51 S. Ct. 392, a case appealed from this court, that "the constitutional guaranty does not extend to the mere interest of an official, as such, who has not been * * * denied the equal protection of the laws" and his suit would be dismissed without deciding the merits of the question; and now when on the other hand, the individual who is discriminated against appeals to the court the answer returned to him is that the court will still not decide the merits of the question for if the law be discriminatory, it is not void as to him whatever it might be as to domestic [fol. 42] corporations, so that he has no sustainable complaint; and thus by whatever door the court is approached the court declines to act; and the discrimination goes on from year to year and the constitution continues to be violated, and will be in the future as in the past. When the state is proceeding to the enforcement of a law which denies to any person within its jurisdiction the equal protection of the laws, it is upon the court, when appealed to, that the power and mandatory constitutional duty is imposed, to prevent the enforcement of that law in so far as it effectuates the obnoxious discrimination; but, with deference, the course of the court here is to the opposite effect, and is in substance, by its non-action to sanction the unconstitutional discrimination and continued enforcement thereof. Thus viewing the matter in its ultimate effect, I must in response to my sense of constitutional obligation respectfully decline to join in the course now taken by the court, and must avail of the privilege to record my dissent.

Judge McGowen joins in this dissent.

[fol. 43] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL—Filed Dec. 8, 1931

To the Honorable Sydney Smith, Chief Justice of the State of Mississippi and presiding judge thereof:

Your petitioners, S. B. Lawrence, an adult resident of Jackson, and the Fidelity & Deposit Company of Maryland,

a corporation organized under the laws of the State of Maryland, and domiciled at Baltimore in said state, appellants in said cause, and the Maryland Casualty Company, surety on their appeal bond to the Supreme Court of the State of Mississippi, in the above-entitled cause, in this, their petition for an appeal from the final judgment rendered against petitioners by the Supreme Court of the State of Mississippi to the Supreme Court of the United States, respectfully show unto the Court that upon the 23rd day of February, 1931, a judgment was rendered in the above-entitled cause against S. B. Lawrence and the Fidelity & Deposit Company of Maryland, his surety, by the Chancery Court of the First Judicial District of Hinds County, Mississippi, in favor of the State of Mississippi. That the petitioner, S. B. Lawrence, and the Fidelity & Deposit Company of Maryland prosecuted an appeal from said judgment rendered in the Chancery Court of the First Judicial District of Hinds County, Mississippi, as aforesaid, to the Supreme Court of the State of Mississippi, and the Maryland Casualty Company became surety on their appeal bond. That upon the 9th day of November, 1931, the judgment and decree rendered by the Chancery Court of the First Judicial District of Hinds County, Mississippi, against S. B. Lawrence and the Fidelity & Deposit Company of Maryland, as aforesaid, was affirmed, and final judgment was entered upon said date against S. B. Lawrence, the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, surety, for said judgment, with interest, costs and damages. That said judg-
[fol. 44] ment rendered by the Supreme Court of the State of Mississippi against the petitioner is now a final judgment of the Supreme Court of the State of Mississippi, and that the said Supreme Court of the State of Mississippi is the highest court in said state in which a decision in said cause may be rendered; that the Supreme Court of the State of Mississippi is the highest court of appellate jurisdiction in the State of Mississippi.

Petitioners show unto the Court that in said suit there was brought in question Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as being in conflict with and in violation of Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, in

that appellants S. B. Lawernce and the Fidelity & Deposit Company of Maryland claimed, alleged and asserted that said Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as enforced and construed in this case, violated said Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, in that said statute deprived the said appellants of their property without due process of law and denied to them the equal protection of the law. That said Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, is in words and figures as follows, to-wit:

"An Act Amending Section II of Chapter 132, Laws of 1924, so as to Exclude from Gross Income Earnings of Domestic Corporations When the Same are Earned Without This State

"Section I. Be it enacted by the legislature of the State of Mississippi, that section II, chapter 132, laws of 1924, be and the same hereby is amended so as to read as follows:

"Section II. That for the purposes of this act, except as otherwise provided for non-residents, the term gross income—

"(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out [fol. 45] of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit or gains, or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five percentum or less, the income may be included for taxation in that portion of any installment payment

representing gain or profit in the year in which payment is received.

"(b) The term gross income, does not include the following items which shall be exempt from taxation under this act:

"(1) The proceeds of life insurance policies and contracts paid upon the death of the insured.

"(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.

"(3) The value of property acquired by gift, bequest, devise or descent, but the income from such property shall be included in the gross income.

"(4) Interest upon the obligations of the United States or its possessions or securities issued under the provisions of the federal farm loan act of July 17, 1916, or bonds issued by the war finance corporation, or the obligations of the State of Mississippi or political subdivisions thereof or of any municipal corporation.

"(5) The amounts received through accident or health insurance as compensation for personal injuries or sickness, plus the amount of any damages received for such injuries or such sickness or injury, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

"(6) Salaries, wages and other compensation received from the United States Government or officials or employees thereof, including persons in the military or naval forces of the United States.

[fol. 46] "(7) Income received by any religious denomination or by any institution or trust for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes, if such income be used exclusively for carrying out one or more of such purposes.

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay a tax pursuant to this act, or dividends from a national bank or state bank organized under the laws of the State of Mississippi.

"(9) In the case of taxpayers other than residents, gross income includes gross income from sources within this state.

"(10) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policy-holder as is paid back or credited to or treated as an abatement of premium of such policy-holder within the taxable year.

"(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising.

"Sec. 2. That this act take effect and be in force from and after the first day of January, 1928.

"Approved December 1, 1928."

The decision of the said Supreme Court of the State of Mississippi in its said judgment, heretofore referred to and entered upon the 9th day of November, 1931, was in favor of the validity of the said statute of the State of Mississippi hereinbefore referred to, and the Supreme Court of the State of Mississippi, by its said judgment applied and enforced the said statute against the petitioners, and each of them, in said final judgment over the claim and assertion of petitioners that said statute of the State of Mississippi hereinbefore set out, as construed and applied, violated Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, as hereinbefore set out.

[fol. 47] Petitioners show unto the Court that in the rendition of said final judgment against said petitioners, certain errors were committed to the prejudice of your petitioners, all of which in detail appear in the assignment of errors herewith filed in this cause.

Wherefore your petitioners feeling aggrieved by the final decision and judgment of the Supreme Court of the State of Mississippi hereinbefore set forth, pray for the allow-

ance of an appeal from the judgment of the Supreme Court of the State of Mississippi, with supersedeas as now allowed by law for the correction therein of the errors complained of. And your petitioners present herewith an assignment of errors to be presented for argument in the Supreme Court of the United States, and petitioners tender herewith their formal and duly executed bond with good and sufficient sureties joining in the execution of said bond, said bond being conditioned according to law. Your petitioners pray the approval of said bond and that transcript of the pleas and proceedings therein duly authenticated may be forthwith, in accordance with law, sent to the Supreme Court of the United States. Notice hereof has been duly served upon the attorneys of record for the appellees herein. As in duty bound, your petitioners will ever pray.

This the 8th day of December, 1931.

S. B. Lawrence, Fidelity and Deposit Co. of Md., Maryland Casualty Co., by Watkins & Watkins, Eager, Attorneys for Petitioners.

Notice for the foregoing petition for appeal acknowledged and service waived, this 8 day of December, 1931.

George T. Mitchell, Attorney General of the State of Mississippi, by Walter A. Smith, Jr., Attorneys for Appellees.

[fol. 47½] [File endorsement omitted.]

[fols. 48 & 49] Bond on appeal for $6,000, approved December 8, 1931, omitted in printing.

[fol. 50] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE et al.

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI et al.

ORDER ALLOWING APPEAL AND APPROVING BOND—Filed Dec. 8, 1931

The above-entitled matter, coming on for hearing upon the petition of S. B. Lawrence, the Fidelity & Deposit Com-

pany of Maryland and the Maryland Casualty Company, petitioners for an appeal from the final judgment of the Supreme Court of the State of Mississippi in said cause, and upon examination of the said petition and the record in said matter, and desiring to give the petitioners opportunity to present in the Supreme Court of the United States the questions presented by the record in the said matter; therefore, it is ordered that an appeal with supersedeas from the judgment of the Supreme Court of the State of Mississippi be and is hereby allowed petitioners as allowed by law, and that the appeal bond presented by the said petitioners for Six Thousand Dollars ($6000.00), be and the same is hereby approved.

This the 8th day of December, 1931.

Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

[File endorsement omitted.]

[fol. 51] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENTS OF ERROR—Filed December 8, 1931

Plaintiffs in error, S. B. Lawrence, and the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, corporations organized under the laws of the State of Maryland, and domiciled at Baltimore in said state, sureties upon the bonds of the said S. B. Lawrence, would show unto the court in this assignment of error that there was manifest error, prejudicial to them, apparent of record in the proceedings, decision and final judgment in the Supreme Court of the State of Mississippi in the above-entitled cause, in this, to-wit:

(1) The Supreme Court of the State of Mississippi committed error in affirming the judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, appealed from, and in rendering final judgment against plaintiffs in error upon the 9th day of November, 1931, in the above entitled cause.

(2) The Supreme Court of the State of Mississippi committed error in failing and refusing to render a judgment reversing the judgment rendered against S. B. Lawrence and the Fidelity & Deposit Company of Maryland appealed from, and in failing and refusing to render a judgment in the Supreme Court of the State of Mississippi in favor of the said S. B. Lawrence and his said sureties and dismissing said suit.

(3) The Supreme Court of the State of Mississippi committed error in holding that Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, was valid over and against the objections of plaintiffs in error that said statute, as applied and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived plaintiffs in error of their property without due process of law and denied to them the equal protection of the law.

(4) The Supreme Court of the State of Mississippi committed error in holding that Section 11, Chapter 132, Missis-
[fol. 52] sippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, did not violate the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the said plaintiffs of their property without due process of law and denied to them the equal protection of the law.

(5) The Supreme Court of the State of Mississippi committed error in holding that S. B. Lawrence, as well as the sureties upon his respective appeal bonds were liable for income contracted for, and earned and collected exclusively beyond the limits of the State of Mississippi in the State of Tennessee, by reason of which error and the enforcement of Chapter 32, Mississippi Laws of 1928, extraordinary session, hereinbefore referred to, said judgment violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived plaintiffs in error of their property without due process of law and denied to them the equal protection of the law.

(6) The Supreme Court of the State of Mississippi committed error in holding that the Mississippi law of 1924,

amended by Chapter 32 of *of* the Mississippi laws of 1928, hereinbefore referred to, justified the imposition of liability upon plaintiff in error S. B. Lawrence and the respective sureties upon his several appeal bonds by reason of the matters and things appearing in this record.

(7) For other reasons apparent.

S. B. Lawrence, Fidelity & Deposit Co. of Md., Maryland Casualty Co., by Watkins, Watkins & Eager, Attorneys for Plaintiffs in Error.

[fol. 52½] [File endorsement omitted.]

[fol. 53] Citation, in usual form, showing service on George T. Mitchell, filed December 8, 1931, omitted in printing.

[fol. 54] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed December 8, 1931

The Clerk of the Supreme Court of the State of Mississippi, in making and transmitting the record in the above-entitled cause to the Supreme Court of the United States, will include in the record the following:

(1) Petition for review filed by the appellants in the court below; Record, 2-14, each inclusive.

(2) Affidavit filed by S. B. Lawrence before the Mississippi State Tax Commission; Record 22-23.

(3) Opinion of the Tax Commission; Record, 24.

(4) Certified copy of order of the Tax Commission; Record 26, 27, 28.

(5) Demurrer by the Attorney General of the State of Mississippi. Record 107-108.

(6) Final decree; Record 109-110.

(7) Appeal Bond to Supreme Court of the State of Mississippi; Record 111.

(8) Appeal bon- on the petition for rehearing. Record 15.

(9) Assignment of error in the Supreme Court of the State of Mississippi.

(10) Judgment of affirmance in the Supreme Court of the State of Mississippi.

(11) Opinions delivered by the Supreme Court of the State of Mississippi.

S. B. Lawrence, Fidelity and Deposit Co. of Md., Maryland Casualty Co., Attorneys for Appellants.

Service of the foregoing præcipe acknowledged this 8th day of December, 1931.

George T. Mitchell, Attorney General of the State of Mississippi, by Walter A. Smith, Jr.

[File endorsement omitted.]

[fols. 55 & 56] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANTS AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Dec. 19, 1931.

S. B. Lawrence, the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, sureties in the above entitled cause, in order to secure reversal of the judgment of the Supreme Court of Mississippi appealed from, will rely upon the following points:

(1) The taxing power of the Mississippi ended at the borders of the state, and it was without power or authority to impose upon or collect from the appellant an excise tax on income contracted for and earned exclusively beyond the limits of the State of Mississippi.

(2) In the present case, the Supreme Court of the State of Mississippi held that Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, required the appellant S. B. Lawrence to include within his gross income money contracted for and earned exclusively beyond the limits of the State of Mississippi, and by reason thereof, said statute of the State of Mississippi violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives appellants of their property without due process of law and denies to them the equal protection of the law.

(3) Even if it be true that the State of Mississippi had the power and authority to levy an excise tax against the appellant upon income contracted for and earned by the appellant S. B. Lawrence exclusively beyond the limits of the State of Mississippi, domestic corporations were not required to include such gross income, and for the year 1929, and at all times since said date, the Mississippi State Tax Commission has knowingly and intentionally failed and refused to assess such domestic corporations with income earned beyond the limits of the state, by reason of which the appellant S. B. Lawrence suffered damage and [fol. 58] discrimination, thereby causing said statute of the State of Mississippi hereinbefore referred to, to violate the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law.

(4) Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as construed and enforced against the appellants in this case violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law.

(5) The appellant S. B. Lawrence, in the construction of highways was in active competition with domestic corporations, which domestic corporations were, by the Mississippi

State Tax Commission for the year 1929, and during all subsequent years, knowingly, intentionally and systematically relieved from liability for income earned exclusively beyond the borders of the State of Mississippi. Even if the State of Mississippi had the authority, under any circumstances, which is denied, to impose an excise tax upon such income earned beyond the limits of the state, under the Mississippi statute hereinbefore referred to, then such statute, as construed and enforced, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law.

(6) Other points to be presented at the hearing.

(7) Designation of Portions of Record to Be Printed.

The Clerk of this court will print the entire record in the above-entitled cause transmitted from the Supreme Court of the State of Mississippi.

Wm. H. Watkins, Attorneys for Appellants.

Service acknowledged by copy, this 15th day of December, 1931.

George T. Mitchell, Atty. General, by Walter A. Smith, Jr., Asst. Atty. Gen., Attorneys for Appellee.

[fol. 59] [File endorsement omitted.]

File No. 36,394. Mississippi Supreme Court. Term No. 580. S. B. Lawrence et al., appellants, vs. State Tax Commission of the State of Mississippi. Filed December 19, 1931. File No. 36,394.